



**Njogu v Nyaga (Civil Appeal E027 of 2023)  
[2024] KEHC 1876 (KLR) (28 February 2024) (Judgment)**

Neutral citation: [2024] KEHC 1876 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT EMBU  
CIVIL APPEAL E027 OF 2023  
LM NJUGUNA, J  
FEBRUARY 28, 2024**

**BETWEEN**

**IRENE WANJIRA NJOGU ..... APPELLANT**

**AND**

**LAWRENCE MURIITHI NYAGA ..... RESPONDENT**

*(Appeal arising from the decision of Hon. D. Endoo in Chief Magistrate's Court at Embu Civil Suit No. 114 of 2022 delivered on 30<sup>th</sup> May 2023)*

**JUDGMENT**

1. The appellant has filed a memorandum of appeal dated 15<sup>th</sup> June 2023 challenging the decision of the trial court and seeking orders that the appeal be allowed, the award of general damages by the trial magistrate be set aside and substituted with a reasonable award commensurate to the injuries suffered by the appellant, this court to award damages for future medical expenses and general damages for diminished earning capacity and the costs of appeal be borne by the respondent. The appeal is premised on the grounds that the learned magistrate erred in law and fact:
  - a. By awarding the appellant general damages of Kshs 650,000/=, an amount that is inordinately low considering the seriousness of the injuries suffered;
  - b. In failing to appreciate the principles available for consideration in awarding general damages which led to an erroneous assessment of the damages resulting in an award that is so low compared to what the appellant should have been awarded;
  - c. Failing to address in its award, damages for future medical expenses even though the same was pleaded and proved through evidence;



- d. By failing to consider and address in her judgment, and award general damages for diminished earning capacity against the weight of the evidence adduced despite the fact that the same had been strictly pleaded and proved;
  - e. By failing to consider and address the prayer for future medical expenses and general damages for diminished earning capacity; and
  - f. In failing to consider the appellants submissions and cited authorities on the quantum of damages.
2. The trial court suit was instituted by a plaint dated 17<sup>th</sup> August 2022 seeking judgment against the defendant/respondent for general damages for pain and suffering and diminished earning capacity, special damages of Kshs 18,050/=, future medical expenses, costs of the suit and interest and any other relief the court deems fit to award.
  3. In the plaint, the plaintiff//appellant stated that on or about 14<sup>th</sup> March 2021, she was a lawful passenger in motor vehicle registration number KAY403J which was being driven along Kathangariri-Kibugu Road when the defendant/respondent's lawful driver so negligently, dangerously and/or carelessly drove and/or controlled the said motor vehicle that it lost control, thus it overturned and as a result, the plaintiff sustained serious bodily injuries and has suffered loss and damage.
  4. That the plaintiff/appellant produced evidence in support of her claim and stated that she suffered the following injuries:
    - i. Fracture on the right mandible;
    - ii. Right shoulder dislocation;
    - iii. Fracture of the left mid-shaft femur; and
    - iv. Lacerations on the right forehead region.
  5. The defendant/respondent filed his statement of defense denying all the averments made in the plaint. The matter proceeded to hearing and PW1 was the appellant who stated that on the fateful day, she was onboard the said motor vehicle and she noted that the driver was driving dangerously. That the passengers warned him but the driver did not heed. That at a bend, the driver lost control of the motor vehicle and began driving in a zigzag manner, hit the guardrails on the left-hand side of the road, rolled and landed on its roof.
  6. She stated that she and the other passengers in the vehicle suffered injuries and were assisted by members of the public to get to Kibugu Health Center for first aid. That she was transferred to Tenri Hospital for further treatment and to Ladnan hospital for management. That she cannot eat properly because of the injury to the jaw. That a metal plate that was placed in her leg hinders her from doing housework and that she cannot lift heavy things associated with farm work. That the metal plate should be removed sometime in the future at a cost of Kshs 150,000/=. The defendant/respondent did not tender any evidence at the hearing.
  7. The trial magistrate directed the parties to file their written submissions and they both complied. The same were considered and in her judgment, the trial magistrate found liability at 100% in favour of the appellant/plaintiff, awarded general damages of Kshs 650,000/=, special damages of Kshs 18,050/= and costs with interest. In her judgment, she did not consider the prayer, neither did she make any award for future medical expenses and general damages for diminished earning capacity.
  8. The court directed the parties to file their written submissions but only the appellant complied.



9. It was the appellant's submission that after he accident, the appellant has been suffering acute pain in the injured areas. That according to the medical examination report by Dr. Phyllis Muhonja, the appellant suffered 80% disability from the injuries sustained and the respondent did not produce any evidence at the trial to counter this evidence. that the award of Kshs 650,000/= as general damages for pain and suffering should be enhanced to Kshs 2,000,000/= considering similar decided cases and economic inflation.
10. For this argument, reliance was placed on the cases of *Jesca Kaari Mutwiri Mwangi v Fara Said Hassan & Another* (2009) eKLR and *Moi Teaching and Referral Hospital Board & Christopher K. Kinyua v Leonard Kibiwott Kosgei* (2020) eKLR where for similar injuries, the court awarded Kshs 1,500,000/= and Kshs 2,000,000/= respectively. That the future medical expenses for removing the metal plate in the leg were estimated at Kshs 150,000/= according to the medical examination report and so the same should be awarded as it is justified.
11. On the issue of general damages for diminished earning capacity, she submitted that prior to the accident, she was able to fend for herself but can no longer do that because she cannot engage in her farming work which was fetching her an income. She suggested that the court does award a global sum of Kshs 1,000,000/= under this head and relied on the case of *Joseph Muchiri Mbugua v Gatimu Ndirangu* (2019) eKLR where the court relied on the findings in the case of *Butler v Butler* (1984) KLR 225 and the case of *Eugene Reeksting v Attorney General & Another* (2021) eKLR where the court awarded a global sum of Kshs 1,000,000/= where the plaintiff suffered 30% disability.
12. In my view, the issues for determination are as follows:
  - a. Whether general damages for pain and suffering as awarded by the trial court are commensurate to the injuries suffered by the respondent;
  - b. Whether the appellant should be awarded general damages for diminished earning capacity; and
  - c. Whether the appellant should be awarded future medical expenses.
13. It is worth reiterating that the appellate court makes its decision purely based on the record and findings of the trial court as was held in the case of *Okeno v Republic* (1972) EA 32 wherein the court held:
 

“An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and the appellate court must itself weigh conflicting evidence and draw its own conclusions. It is not the function of the first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's finding and conclusion. It must make its own finding and draw its own conclusions only then can it decide whether the magistrate's finding should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses.”
14. On the issue of whether the general damages awarded are commensurate to the injuries sustained, the trial court was guided by the cases of *Simon Taveta v Mercy Mutitu Njeru* (2014) eKLR, *Peter Muvake & Another v Agnes Nduku Mutie* (2018) eKLR where the court awarded Kshs 400,000/= for similar injuries and *Paul Gitbinji & Another v Gatwiri Muriithi* (2018) eKLR where the court awarded Kshs 450,000/=. In the case of *John Kipkemboi & Another v Morris Kedolo* (2019) eKLR the court stated:
 

“The assessment of damages in personal injury case by court is guided by the following principles: -



- 1) An award of damages is not meant to enrich the victim but to compensate such victim for the injuries sustained;
- 2) The award should be commensurable with the injuries sustained;
- 3) Previous awards in similar injuries sustained are mere guide but each case be treated on its own facts;
- 4) Previous awards to be taken into account to maintain stability of awards but factors such as inflation should be taken into account; and
- 5) The awards should not be inordinately low or high (See *Boniface Waiti & another v Michael Kariuki Kamau* (2007) eKLR.”

15. The injuries suffered by the appellant were a fracture on the right mandible, right shoulder dislocation, fracture of the left mid-shaft femur and lacerations on the right forehead region. In the case of *James Gathirwa Ngungi v Multiple Hauliers (EA) Limited & Another* [2015] eKLR the plaintiff suffered compound comminuted fracture of the right tibia Compound Comminuted fracture of the right fibula, fracture of the left proximal radius, fracture of left ulna, head injury, deep cut wound of the parietal region about 4cm, soft tissue injury and bruises of both hands multiple facial cuts and lacerations and pathological/ re-fracture of the right leg. Court awarded Kshs 1,500,000/=. In the case of *Denshire Muteti Wambua v Kenya Power and Lighting Co. Ltd* [2013] eKLR the claimant suffered multiple fractures involving the right femur, left femur and left scaphoid bones; dislocation of left elbow joined associated with a fracture of the radial head; dislocation of the left lunate bone and bruises parietal scalp. The Court of Appeal awarded Kshs 1,500,000 general damages when in fact the fracture in the case were much more serious. These injuries were much more severe than the ones suffered herein and the superior courts awarded Kshs 1,500,000/= in each of the cases. In my view, the award of the trial court for general damages for pain and suffering is not low given the circumstances of the case though the appellant’s suggestion of Kshs 2,000,000/= is not tenable and is not based on jurisprudence. I find that Kshs 1,000,000/= is reasonable.
16. On the issue of whether the appellant should be awarded general damages for diminished earning capacity, it is her case that she used to sustain her income before the accident but now, it is almost impossible to attend to her farm work. According to the medicolegal report by Dr. Muhonja, the appellant suffered 80% disability as a result of the injuries. The report stated that the appellant underwent open reduction internal fixation surgeries of the left femur where an interlocking nail was inserted. That she also underwent interosseous wiring fixation therapy for the right mandible, among other treatments.
17. As a result of the 80% disability, the appellant claimed that her earning capacity has been diminished. Diminished/loss of earning capacity can be claimed as general damages and it need not be strictly proved as is the case of special damages. In the case of *Mumias Sugar Company Limited v Francis Wanalo* [2007] eKLR the court stated:

“The award for loss of earning capacity can be made both when the plaintiff is employed at the time of the trial and even when he is not so employed.....Loss of earning capacity can be claimed and awarded as part of general damages for pain, suffering, and loss of amenities or as a separate head of damages. The award can be a token one, modest or substantial depending on the circumstances of each case. There is no formula for assessing loss of earning capacity. Nevertheless, the judge has to apply the correct principles and take the relevant factors



into account in order to ascertain the real or appropriate financial loss that the plaintiff has suffered as a result of the disability.

18. The court reiterated this position in the case of *Butler v Butler* [1984] KLR 225 at 232 (*supra*) where it was held:

“Loss of earning capacity is a different head of damages from an actual loss of future earnings which can readily be proved at the time of the trial. The difference was explained by Lord Denning M.R. in *Fairely v John Thompson (Design & Contracting Division) Ltd* [1973] 2 Lloyd’s Rep 40,42(CA).... Compensation for loss of future earnings is awarded for real assessable loss proved by evidence. Compensation for diminution of earning capacity is awarded as part of the general damages.”

19. Diminished/loss of earning capacity is subjected to the standard of proof in civil cases. The appellant stated in evidence that at the time of the accident, she was a 60-year old farmer who drew an income of Kshs 50,000/= monthly from her farming. The respondent did not controvert this evidence. On a balance of probabilities, it is likely that the appellant will lose the ability to make the income as she used to make before the accident. In the case of *Joseph Nyaboke Nyanchari v Stanley Nyabuto Mose* [2021] eKLR the court awarded Kshs 551,580/= where the plaintiff suffered 75% disability and was earning Kshs 9,193/= and was 5 years away from retirement. In the case of *Nyatogo v Mini Bakeries Limited* (Civil Appeal E38 of 2021) [2023] KEHC 1593 (KLR) the court awarded a global sum of Kshs 800,000/= as general damages for loss of earnings where the plaintiff suffered between 15%-50% disability. Under this head, I find that a global sum of Kshs 900,000/= is modest and fair.
20. For future medical expenses to remove a metal plate in the lower limb of the plaintiff, the court in the case of *Peter Mulanda Wanje v Capture Transport Limited & 2 others* [2022] eKLR upheld an award of Kshs 120,000/= as awarded by the trial court where the implants were similar to the ones herein. The appellant submitted that Kshs 150,000/= would be modest under this head. I find that the said sum is reasonable.
21. All in all, it is trite that no amount of money can restore the appellant’s frame to its original state. This was echoed in the case of *H. West & Son Ltd -v-Shepherd* (1964) AC. 326 in which Lord Morris of Borth-y-Gest stated as follows;

“... but money cannot renew a physical frame that has been battered and shattered. All that judges and courts can do is to award sums which must be regarded as giving reasonable compensation. In the process there must be the endeavour to secure some uniformity in the general method of approach. By common consent awards must be reasonable and must be assessed with moderation. Furthermore, it is eminently desirable that so far as possible comparable injuries should be compensated by comparable awards. When all this is said it still must be that amounts which are awarded are to a considerable extent conventional.”

22. In conclusion, I have considered all the pleadings and submissions of the trial court, the submissions of the parties to this appeal, relevant caselaw and the provisions of the law and do find that the appeal partially succeeds and I hereby make the following orders:
- a. Liability is held at 100% by the respondent;
  - b. Special damages (medical expenses) Kshs 18,050/= with interest from the date of filing the plaint;
  - c. Future medical expenses - Kshs 150,000/=;



- d. General damages for pain and suffering - Kshs 1,000,000/=;
- e. General damages for diminished earning capacity - Kshs 900,000/=;
- f. Each party to bear its own costs of the appeal;
- g. Interest on (d) and (e) above shall accrue from the date of this judgment until payment in full;
- h. All interests shall be at court rates.

23. It is so ordered.

**DELIVERED, DATED AND SIGNED AT EMBU THIS 28<sup>TH</sup> DAY OF FEBRUARY, 2024.**

**L. NJUGUNA**

**JUDGE**

.....for the Appellant

.....for the Respondent

